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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-933

K. G. PARSONS, IVA E. PARSONS, *et al*
Petitioners,

v.

OTHO KNOPP AND NAOMI M. KNOPP,
Respondents,

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ORTON A. JONES
HEDGES AND JONES
216 Market Street
Spencer, West Virginia 25276

Counsel for Petitioners

INDEX

Page

Citations---------- ii

Acceptance of petitioners' version of opinion below and other matters---------- 1

Reasons For Denying the Writ---------- 2

1. No Federal Constitutional Question Is Here Presented On The Issue Of Any Right Of Petitioners To A Jury Trial---------- 2

2. The Decision Below Denied Petitioners No Appeal Protected By The United States Constitution---------- 4

Conclusion---------- 6

CITATIONS

CASES:

Page

Koen v. Koen, 86 W. Va. 503, 103 S. E. 322 (1920)---------- 2

Steptoe v. Mason 153 W Va. 783, 172 S. E. 2d 587 (1970)---------- 3

Ross v. Bernbard, 396 U. S. 531, 90 S. Ct. 733,
24 L. Ed. 2d 729 (1970)---------- 4

Rinaldi v. Yeager, 384 U. S. 305, 86 S. Ct. 1497,
16 L. Ed. 2d 577 (1966)---------- 4

Williams v. Oklaboma City, 395 U. S. 458, 89 S. Ct. 1818,
23 L. Ed. 2d 440 (1969)---------- 4

MISCELLANEOUS:

27 Am Jur. 2d, *Equity* § 119 (1966)---------- 2

Rule 38, West Virginia Rules of Civil Procedure---------- 2

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Respondents respectfully oppose the petition of petitioners that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on September 17, 1973.

OPINION BELOW AND OTHER MATTERS

For purposes of this proceeding respondents accept the version of the opinion below, timeliness of filing of the petition, questions presented, constitutional and statutory provisions cited and the statement of the case all as set forth in the petition.

REASONS FOR DENYING THE WRIT

1.

No Federal Constitutional Question Is Here Presented On The Issue Of Any Right Of Petitioners To A Jury Trial.

Petitioners have admitted in their petition that the principal object and concern of this lawsuit was the reformation of a deed on the basis of a mutual mistake of fact, clearly relief that was equitable in nature. Certainly all other relief in the case flowed obviously and necessarily from that issue. A court of equity ought to do justice completely and not by halves. 27 Am. Jur. 2d, *Equity* § 119 (1966). Although the West Virginia Rules of Civil Procedure abolished procedural distinctions between actions at law and suits in equity in that State they created no new right of trial by jury where none had theretofore existed. Rule 38, W. Va. RCP.

It has long been held in West Virginia that where a court of equity has properly acquired jurisdiction on equitable grounds, it will go on to do complete justice, though in so doing it has to administer remedies which rightly pertain to a court of law. *Koen v. Koen*, 86 W. Va. 503, 103 S.E. 322 (1920).

In any event, this is a question of construction of the rules of procedure and equity jurisprudence of the State, which has been passed upon by the appellate court of that State and does not present a federal constitutional question cognizable by this Court.

Moreover, the petition for appeal and supersedeas filed by petitioners in the Supreme Court of Appeals of West Virginia was a petition for appeal from a certain Order of the Circuit Court of Jackson County, West Virginia, on June 16, 1972, by which Order the said Circuit Court denied the motion of petitioners to set aside the judgment and award a new trial. (Petition for Appeal and Supersedeas, pages 1 and 2).

The said motion of petitioners, the denial of which was the alleged

grievance from which appeal was sought, was filed May 10, 1972, and, although containing six assignments of error as grounds therefor, did not assign or otherwise mention a denial of a trial by jury as error constituting grounds for said motion.

The case of *Steptoe v. Mason*, 153 W. Va. 783, 172 S. E. 2d 587 (1970), in construing Rules 7 (b) and 59 (b), W. Va. Rules of Civil Procedure, held that Rule 7 (b) requires that grounds for a motion for a new trial be stated with particularity.

Thus in omitting the question of a jury trial from their motion, petitioners should not be held to complain, for that specific reason, of an order denying their motion. This is a matter within the peculiar purview of the State appellate court and is not a federal constitutional question that should be reviewed by this Court.

Further, petitioners, in their assertion of a right to trial by jury of the issues in this case base that assertion upon their construction of language of particular State statutes contained in the West Virginia Code. Thus their position is necessarily based upon a right granted, if at all, by legislative enactment, under these specific facts and circumstances, not upon any basic constitutional principles.

It is the province of the State appellate court to review and construe the statutes enacted by the Legislature of that State, as well as the accumulated body of law relating to suits in equity, actions at law, statutory proceedings and rules of procedure, a principle which applies to the case at bar. The facts and applicable law, as the same are held to be by petitioners, were fully and amply presented to the Supreme Court of Appeals of West Virginia by petitioners, much more extensively than in their petition before this Court. After full and complete review and consideration thereof, with no opposing brief or memorandum submitted, the Supreme Court of Appeals refused the appeal and supersedeas. The judgment of the Circuit Court, as thus affirmed by the State Supreme Court of Appeals, should not be disturbed.

The case of *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed 2d 729 (1970), cited by petitioners, is inapplicable here, being a stockholders' derivative suit in which federal laws and procedures were applied in a United States District Court, later appealed to a United States Court of Appeals and thence to this Court. That case had no connection with any state law or state tribunal.

2.

The Decision Below Denied Petitioners No Appeal Protected By The United States Constitution.

This court stated in *Rinaldi v. Yeager*, 384 U. S. 305, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966) and reaffirmed in *Williams v. Oklahoma City*, 395 U.S. 458, 23 L. Ed. 2d 440, 89 S. Ct. 1818 (1969), that "This Court has never held that the States are required to establish avenues of appellate review..." and then continued to state "but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

The petitioner in the *Rinaldi* case was indigent and was effectively barred from any appeal by reason of his pecuniary inability to pay for the required transcript of proceedings. The line of cases on this point has treated as an unreasoned distinction the inability to finance the various requirements of an appeal.

An unreasoned distinction, therefore, is one which grants an appeal to one litigant but denies it to another based upon requirements in the law to which both are subject that are wholly alien to the merits of the respective controversies, such as ability to pay for the transcript of record.

It is interesting to note petitioners' observation that in West Virginia not only indigents but every aggrieved party seeking an appeal is shackled by the same unreasoned distinctions. Certainly if all are

treated alike there is no distinction.

Surprisingly, petitioners even admit that the instant case would perhaps be different if West Virginia were only one of many states which deny an appeal as a matter of right.

Is this to say that changes made by the Legislatures or by the constitution - altering processes of "many" sister states would alter the rights of West Virginians without the people of West Virginia taking any active step to establish or change their own rights?

By petitioners' own admission, the people of West Virginia in their constitution, and their Legislature in the statutes, have established an avenue of appellate review and it is being administered even-handedly among all of her citizens.

Petitioners also admit that under West Virginia appellate procedure every party deeming himself aggrieved by a final order of a circuit court may petition *ex parte* for a writ of error. His petition is accompanied by a note of argument in support of his petition. His case is set down for oral argument before the entire Supreme Court of Appeals. This opportunity is given to all petitioners as of right and was in fact enjoyed by the petitioners in the instant case.

What is not extended as a matter of course is the filing of an opposition brief and presentation of oral argument by parties opposing the appeal. In essence, the points and arguments advanced by petitioners are the only points and arguments read or heard by the court, a tremendous advantage of which these petitioners can hardly complain.

Where, as in the instant case, the entire appellate court reads one party's petition and brief and hears his oral argument and receives nothing from his opponent and yet determines to deny his appeal, whatever could be gain from forcing the court to hear the other side of the case?

Petitioners have wholly failed to demonstrate that they have been prejudiced in any particular as to any right protected by the Constitution of the United States and cognizable by this Court.

CONCLUSION

For the foregoing reasons respondents respectfully submit that the decision of the Supreme Court of Appeals of West Virginia should be affirmed and the writ of certiorari should be denied.

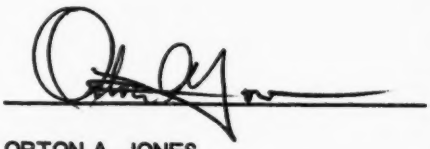
Respectfully submitted,

ORTON A. JONES
HEDGES AND JONES
216 Market Street
Spencer, West Virginia 25276

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Orton A. Jones, attorney for the respondents, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 30th day of April, 1974, I served three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari on the petitioners by depositing same in a United States post office, with postage prepaid, addressed to counsel of record for the petitioners, Leo Catsonis, Esquire, 207 Security Building, Charleston, West Virginia 25301. I further certify that all parties required so to be served have been so served.



ORTON A. JONES
216 Market Street
Spencer, West Virginia 25276

Counsel for Respondents